No. 263

In the Supreme Court of the United States

October Term, 1944

Fidelity-Philadelphia Trust Company and Robert A. Workman, Executors of the Estate of Anna C. Stinson, Deceased, petitioners

v.

Walter J. Rothensies, Individually and as Collector of Internal Revenue for the First District of Pennsylvania

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the district court (R. 73a) is unreported. The opinion of the circuit court of appeals (R. 82) is reported in 142 F. 2d 838.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 15, 1944 (R. 87). The petition for a writ of certiorari was filed on July 17, 1944, and was granted on October 9, 1944, on a

limited basis (R. 88). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the full value, at decedent's death, of property transferred in trust for the decedent for her life, then to the decedent's two daughters for their lives, if they survived her, and then to her daughters' descendants, if any, should be included in decedent's gross estate under Section 302 (c) of the Revenue Act of 1926, when the decedent retained a testamentary power of appointment over the property, to be effective if her daughters died without leaving descendants.[1]

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are set forth in the Appendix, *infra*, pp. 14–17.

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[1] The petition for a writ of certiorari (p. 2) presented the following questions: (1) "whether an irrevocable transfer in trust by the decedent on March 26, 1928, with life income and a remote power of appointment reserved was intended to take effect in possession or enjoyment at or after her death within the meaning of Section 302 (c) of the Revenue Act of 1926" and, (2) "if it was, whether the entire value of the corpus should be included in decedent's gross estate for estate tax purposes or whether the value of intervening estates should be deducted." In its order granting the petition (R. 88), this Court limited its grant "to the question whether the entire value of the corpus of the trust at the time of decedent's death should be included in the decedent's gross estate", and transferred the case to the summary docket.

STATEMENT

The pertinent facts found by the district court (R. 68a–72a) may be summarized as follows:

On March 26, 1928, the decedent, Anna C. Stinson of Bryn Mawr, Pennsylvania, transferred certain property in trust, the value of which at the time of her death was $84,443.49 (R. 68a, 69a). The material provisions of the deed of trust were to the following effect: The income of the trust was to be paid to the settlor during her life and at her death to her daughters, aged 12 and 10 respectively at the time the trust was created, in equal shares during their respective lives. At the death of each daughter, the corpus or principal supporting her share of the income was to be paid to her descendants, *per stirpes.* In the event of the decease of either daughter without leaving descendants surviving, the corpus or principal of such daughter's share was to be added to the share of the other daughter, if then living, to be held upon the same trust as her original share, or to the share of her then surviving descendants, *per stirpes.* In the event of the death of both daughters of the settlor without leaving descendants surviving, the corpus or principal of the trust estate was to be paid to such person or persons and upon such estate or estates as the settlor by her last will and testament directed, or, in default of such appointment, to certain designated charitable institutions, share and share alike. (R. 69a–70a.)

By will executed June 6, 1930, the decedent exercised the power vested in her by the trust deed and appointed the income from the property to her four brothers and sisters during their respective lives, share and share alike, in the event that at the time of the decease of the last survivor of her daughters there should be no descendants of either then living; and, upon the decease of any brother or sister, the decedent appointed the corpus providing the income of such sister or brother to certain named charities, differing somewhat from those named in the deed of trust (R. 71a–72a). The trust was testamentary in character and was intended as a substitute for a testamentary disposition in that it was intended to take effect in possession or enjoyment after the death of the decedent (R. 72a).

Mrs. Stinson died on November 17, 1934, at the age of 51, and was survived by two unmarried daughters (R. 68a). Since her death, the decedent's daughters married; three children, living at the time of the decision below, were the fruit of these marriages (R. 72a).

The executors of the decedent's estate did not include the value of the corpus of the trust in the decedent's gross estate (R. 68a). The Commissioner determined that the net value of the property comprising the trust should be included in the decedent's gross estate (R. 23a, 69a). The deficiency which the Commissioner determined as a result of including the trust property was $13,-

442.90 (R. 69a). This amount was paid and a claim for refund was filed (R. 69a).

The district court sustained the Commissioner's denial of the refund (R. 80a) and the court below affirmed (R. 87).

SUMMARY OF ARGUMENT

The circuit court of appeals properly held the full value of the trust corpus includible in the decedent's gross estate because she had retained not only the income for life but also the power to appoint the takers of the corpus in the event of the death of her two daughters without leaving surviving descendants. Not until the death of the settlor leaving her daughters surviving could it be known whether any interests created by the trust would pass or whether the property would pass by virtue of her testamentary appointment. The disposition of the entire property was held in suspense until the death of the decedent, and, therefore, the full value should be included in her gross estate.

The decedent herself having retained the income for life, there was no outstanding life estate at her death and hence no basis for reducing the value of the corpus in respect of any estate.

ARGUMENT

THE FULL VALUE OF THE TRUST PROPERTY WAS PROPERLY INCLUDED IN THE GROSS ESTATE

The court below decided that the transfer made by the decedent in trust was "intended to take

effect in possession or enjoyment at or after death". Section 302 (c) of the Revenue Act of 1926 (Appendix, *infra,* p. 14). This holding, which must be taken as correct on this limited review (*supra,* note 1), makes unnecessary consideration of petitioner's contention (Pet. 7) that the reservation of the "remotely possible reversion or power of control" be "disregarded for estate tax purposes". Considering only whether any deduction from the value of the trust property is warranted, we submit that the instant case is controlled by *Helvering* v. *Hallock,* 309 U. S. 106, and that the full value of the trust property is properly includible in the gross estate.

In the *Hallock* case, the decedent had created a trust to pay the income to his wife for life and upon her death to deliver the principal to the grantor if living. If he should not then be living the property was to go to his children. The grantor predeceased his wife, and this Court held that the value of the corpus, less only the value of the wife's outstanding life estate, was properly includible in the gross estate as a transfer intended to take effect at or after death. In *Rothensies* v. *Huston,* decided with the *Hallock* case and covered by the same opinion, the decedent conveyed property in trust, the income to be paid to his prospective wife during her life; if she should die during the lifetime of the grantor he was to get back the principal, but if after the marriage she should survive him the principal

was to go outright to her. The wife outlived her husband, and this Court held that the full value of the property, less only the value of the outstanding life estate, should be included in the gross estate under Section 302 (c). In *Bryant* v. *Helvering,* which was also decided at the same time as the *Hallock* case and covered by the same opinion, the trust income was payable to the settlor's wife for life and upon her death to the settlor himself should he survive her. Upon the death of the survivor of the settlor and his wife, the principal was to go to his estate unless the trust had been modified or revoked pursuant to a provision giving the settlor and his wife, jointly during their lives, and to either of them after the death of the other, power to modify or revoke. The wife survived the husband, and this Court approved the inclusion in his gross estate of the value of his "vested reversionary interest" (309 U. S. 106, 116) which was the full value of the property minus the life estate of his wife. *Estate of Bryant* v. *Commissioner,* 36 B. T. A. 669, 671–676. In deciding these cases this Court expressly overruled its own prior decisions in the *St. Louis Trust Co.* cases (*Helvering* v. *St. Louis Trust Co.,* 296 U. S. 39; *Becker* v. *St. Louis Trust Co.,* 296 U. S. 48), and remarked that in *Klein* v. *United States,* 283 U. S. 231, which it reaffirmed, "By bringing into the gross estate at his death that which the settlor gave contingently upon it, this

Court fastened on the vital factor." "The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment." 309 U. S. at 110–112.

It is true that the string or tie which was retained by the grantor in this case, a contingent power of appointment over the corpus, is different from the interest in the corpus retained by the decedents in the *Hallock* cases. But the retention of a power of control over the corpus, even if remote, is sufficient to carry the entire gift to the daughters into the gross estate where death terminates the retained power. "Having in mind the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers' device—what particular string—the decedent selected to hold in suspense the ultimate disposition of his property until the moment of his death." *Helvering* v. *St. Louis Trust Co.,* 296 U. S. 39, 47 (dissent).

And while it is true that at decedent's death it still could not be known whether the trust provisions would effectively carry the property in remainder to her grandchildren, or whether, if the daughters died without leaving descendants, the property would pass by virtue of the power of appointment, Section 302 (c) sweeps into the gross estate interests "intended to take effect in possession or enjoyment" not only "at" but "after" death. "That is precisely what the fed-

eral estate tax hits—an exercise of the privilege of directing the course of property after a man's death." *Estate of Rogers* v. *Commissioner,* 320 U. S. 410, 413. Whether the remainder passes as provided in the trust or under the power, its passage will be attributable to decedent's death, for not until then could it be definitely known that the decedent would not survive her daughters and that the gifts in trust would be operative at all. The passage of the entire trust property is "conditioned upon decedent's death" within the meaning of Article 17 of the Regulations (Appendix, *infra,* p. 15). Death cut the string which the decedent selected to hold in suspense the ultimate disposition of the entire property. Consequently the entire value of the trust property must be included in the gross estate. Cf. *Tyler* v. *United States,* 281 U. S. 497, 503, 504; *United States* v. *Jacobs,* 306 U. S. 363, 371; *Porter* v. *Commissioner,* 288 U. S. 436, 444.[2]

[2] Implicit in the decision of the court below in this case, now controlling (see *supra,* pp. 5–6, and note 1), is the conclusion that none of the interests transferred by the decedent are to be excluded from her gross estate simply because it is likely that the transfer of all of the interests, except the grantor's life estate, constituted a gift when the trust was created (*Robinette* v. *Helvering,* 318 U. S. 184). If some part is to be included in the estate, though it was the subject of an *inter vivos* gift, this consideration must be similarly rejected as a reason for not including the whole. In any event, Congress anticipated no complete correlation between the estate and gift taxes (*Smith* v. *Shaughnessy,* 318 U. S. 176), and, incidentally, the transfer in this case was made in 1928 when there was no gift tax.

This conclusion is also supported by *Commissioner* v. *Washer,* 127 F. 2d 446 (C. C. A. 6), certiorari denied, 317 U. S. 653, where the court said (p. 449):

> If *Helvering* v. *Hallock* furnishes, as it purports to do, a practical formula for determining the measure of the gross estate at the time of death, it is not by us to be refined or evaded by limiting inclusion in gross estate to the value of a possibility of reverter which real though it be, in respect to postponing complete passing of property until the event of death, is yet an intangible element in respect to value, and so incapable of measurement.[3]

See also 1 Paul, *Federal Estate and Gift Taxation,* Sec. 7.24–29, pp. 368–387; Warren, *Correlation of Gift and Estate Taxes,* 55 Harv. L. Rev. 1, 27–30 (1941).

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[3] While the question of valuation alone and not the question of whether there was a taxable transfer is before this Court, insofar as the problems merge into one another, we feel that it is incumbent upon us to call this Court's attention to the various views taken by the lower courts on the question of taxability. E. g., compare *Schultz* v. *United States*, 140 F. 2d 945 (C. C. A. 8); *Goldstone* v. *United States*, decided by the Second Circuit on August 11, 1944 (C. C. H. Inheritance, Estate and Gift Tax Service, par. 10, 139); *Central Hanover Bank & Trust Co.* v. *United States*, decided by the Court of Claims on November 6, 1944 (4 P–H Tax Serv., par. 62,757), with *Lloyd's Estate* v. *Commissioner*, 141 F. 2d 758 (C. C. A. 3d), and *Estate of Cain* v. *Commissioner*, 43 B. T. A. 1133, 1139; *Gaston Estate* v. *Commissioner*, 2 T. C. 672, with *Biddle* v. *Commissioner*, 3 T. C. 832, pending on appeal (C. C. A. 3); *Allen* v. *Commissioner*, 3 T. C. 844, pending on appeal (C. C. A. 2).

A. NEITHER THE DAUGHTERS' LIFE ESTATES NOR THE ESTATES OF THEIR DESCENDANTS WERE "OUTSTANDING" AT THE DECEDENT'S DEATH WITHIN THE MEANING OF THE APPLICABLE TREASURY REGULATIONS

In the *Hallock, Houston* and *Bryant* cases (*supra*, pp. 6–8), it was conceded that the value of the outstanding life estate should be excluded because it took effect in possession or enjoyment when the trust was created. Cf. *United States* v. *Pelzer,* 312 U. S. 399; *Ryerson* v. *United States,* 312 U. S. 405; *Commissioner* v. *Brandegee,* 123 F. 2d 58, 62 (C. C. A. 1). And after this Court's decision in the *Hallock* case, the Regulations were amended in conformity with that concession. Treasury Regulations 80 (1937 ed), Article 17, as amended, (Appendix, *infra,* pp. 15–17); Treasury Regulations 105, Sec. 81.17. In the instant case, however, there is no basis for any such concession, because at the time of decedent's death, there were no outstanding estates; the grantor retained not only a contingent power over the corpus but also reserved to herself the income for life.[4]

In the situations before the Court in the *Hallock* case, the first life estate created as of the date of

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[4] Petitioner contends (Br. 26–27) that the estates of the daughters and their descendants were outstanding within the meaning of the Treasury Regulation. In the alternative, petitioner urges that the Regulation is in error if an "outstanding" estate is only one which is in "course of enjoyment". But if it be thought that the Regulation does make an illogical distinction, it is in favor of a reduction in the includible value and is, if anything, a concession to taxpayers. See Paul, *op. cit. supra*, and Warren, *op. cit. supra*.

the indenture was not in favor of the settlor, as here, but in favor of the settlor's wife. When the settlor died, his wife surviving, the enjoyment of her life estate remained unaffected. In this case, however, the daughters' life estates took effect in possession and enjoyment only upon decedent's death. Until that time, she alone enjoyed the property and it could not definitely be known whether the daughters or their descendants, if any, would survive the decedent. The grantor's life estate ceased at her death and the succeeding life estates then came into enjoyment. And since the daughters' descendants could take only if the daughters took or if they survived the decedent, there were no estates outstanding when decedent died, and no interest in the property remained unaffected by that event.

Field's Estate v. *Commissioner,* 144 F. 2d 62 (C. C. A. 2d), petition for certiorari filed by the Government (No. 578) on October 10, 1944, permitted the exclusion of any estates which might conceivably intervene between the decedent's death and the payment of the corpus. In that case, the decedent had the income for life together with the right to get the property back if he should survive his two nieces. The court held that the value of the property must be discounted for the period of the life expectancy of the survivor of the two nieces. We submit that the decision in the *Field* case is wrong. As in this case, there was no outstanding estate within

the meaning of the Regulations, and since the ultimate disposition of the entire corpus was effectively suspended during the decedent's lifetime, the entire value thereof should have been included in his gross estate when he died.

CONCLUSION

Not until the decedent's death could it be known whether any of the gifts in trust would be effective. There were no outstanding estates at the time of her death. The full value of the property transferred in trust was properly included in decedent's gross estate, and the judgment of the court below should, therefore, be affirmed.

Respectfully submitted.

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December, 1944.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(c) [as amended by the Act of March 3, 1931, c. 454, 46 Stat. 1516, and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.[1]

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Treasury Regulation 80 (1937 Ed.):

ART. 17 [as amended by T. D. 5008, 1940–2 Cum. Bull. 286, 287]. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other

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[1] The italicized portion represents the amendment made by the Act of March 3, 1931, as amended by Section 803 of the Revenue Act of 1932. These amendments are not applicable to this case since the trust was created in 1928. *Hassett* v. *Welch*, 303 U. S. 303.

contingency terminable by his death. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the value of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its

decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39 [Ct. D. 1047, C. B. XIV–2, 339 (1935)]) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48 [Ct. D. 1046, C. B. XIV–2, 337 (1935)]) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S., 106 [Ct. D. 1440, C. B. 1940–1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X–1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES.

No. 263.—October Term, 1944.

Fidelity-Philadelphia Trust Company and Robert A. Workman, Executors of the Estate of Anna C. Stinson, Deceased, Petitioners, *vs.* Walter J. Rothensies, Individually and as Collector of Internal Revenue for the First District of Pennsylvania.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 5, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

Our attention here is directed toward the proper valuation for federal estate tax purposes of the corpus of an *inter vivos* trust where the transfer was intended to take effect in possession or enjoyment at or after death and where the settlor retained a life estate in the trust income and a reversionary interest in the corpus.

On March 26, 1928, the decedent, Anna C. Stinson of Bryn Mawr, Pa., transferred certain property in trust, the value of which at the time of her death was $84,443.49. The income of the trust was to be paid to the settlor during her life and at her death to her daughters (aged 12 and 10 at the time of the creation of the trust) during their respective lives. At the death of each daughter, the corpus supporting her share of the income was to be paid to her descendants. If either daughter died without leaving surviving descendants, the corpus of her share was to be added to the share of the other daughter or of the surviving descendants of the other daughter. But if both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the settlor might appoint by will. In default of such appointment, the corpus was to go to certain named charities.

The decedent exercised the power of appointment in a will made in 1930. She died in 1934 at the age of 51, leaving two unmarried

daughters. The latter have subsequently married and both have children.

The Commissioner determined that this arrangement was a transfer in trust intended to take effect in possession or enjoyment at or after death within the meaning of Section 302(c) of the Revenue Act of 1926, 44 Stat. 9, 70, and that the net value of all the property comprising the corpus of the trust should be included in the decedent's gross estate for estate tax purposes. The executors, however, denied that the transfer fell within the meaning of Section 302(c); they further claimed that even if Section 302(c) did apply the value of the life estates of the settlor's daughters and the value of the remainders to their surviving descendants should be deducted from the value of the trust assets for tax purposes.

The executors paid a tax on the full value of the trust assets and filed this claim for refund of the tax. The District Court denied recovery and the court below affirmed. 142 F. 2d 838. Conflict with *Field's Estate* v. *Commissioner,* 144 F. 2d 62, led us to grant certiorari limited to the question of whether the entire value of the corpus of the trust at the time of decedent's death should have been included in the decedent's gross estate.

The courts below, utilizing the principles set forth in *Klein* v. *United States,* 283 U. S. 231, and *Helvering* v. *Hallock,* 309 U. S. 106, correctly held that the decedent's transfer in trust in 1928 was one intended to take effect in possession or enjoyment at or after death within the meaning of Section 302(c) of the Revenue Act of 1926, prior to the amendments of 1931 and 1932. While the matter of valuation was not argued and was not directly in issue in those cases, the inescapable consequence of the principles enunciated there and in the dissenting opinion in *Helvering* v. *St. Louis Union Trust Co.,* 296 U. S. 39, 46, is to include the entire trust corpus in the gross estate of the decedent under these circumstances.

Section 302(c) itself provides for the inclusion within the gross estate of property "to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death." As we said in *Helvering* v. *Hallock, supra,* 110, 111, this provision "deals with property not technically passing at death but with interests theretofore created.

The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment." Cf. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 347. The taxable gross estate, in other words, must include those property interests the ultimate possession or enjoyment of which is held in suspense until the moment of the grantor's death or thereafter.

Tested by that standard, the entire corpus of the trust should have been included in the decedent's gross estate and an estate tax levied on its net value at the date of decedent's death. The ultimate disposition of all the trust property was suspended during the life of the decedent. Only at or after her death was it certain whether the property would be distributed under the power of appointment or as provided in the trust instrument. The life estates of the daughters were contingent upon their surviving their mother and took effect in enjoyment only at the death of the latter. The remainder interests of the descendants of the daughters were contingent upon their surviving both the decedent and the daughters and took effect in possession only after the death of the decedent. Thus until the moment of her death or until an undetermined time thereafter the decedent held a string or contingent power of appointment over the total corpus of the trust. The retention of such a string, which might have resulted in altering completely the plan contemplated by the trust instrument for the transmission of decedent's property, subjected the value of the entire corpus to estate tax liability.

It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant to the measurement of estate tax liability. The application of this tax does not depend upon "elusive and subtle casuistries." *Helvering* v. *Hallock, supra,* 118. No more should the measure of the tax depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests. It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries. The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency, is the measure of the tax. That value is demonstrated by the consequences that

would flow in this instance from the decedent's survival of her daughters and any of the latter's surviving descendants.

We are not concerned here with determining whether the values of any property interests or intervening estates not affected by the decedent's death and not subject to the contingent power of appointment should be deducted from the value of the corpus. The value of the life estate retained by the decedent obviously cannot be deducted. And the life estates of the daughters and the remainder interests of their surviving descendants were all subject to divestment by the contingent power of appointment and were freed from this contingency only at or after the decedent's death. There is thus no basis for deducting their values as suggested by petitioners.

Affirmed.

Mr. Justice DOUGLAS, concurring.

The District Court found that this trust was "intended to take effect in possession or enjoyment at or after" the death of the decedent. The Circuit Court of Appeals agreed. Certiorari was not granted on that question but only on the question whether the entire value of the corpus of the trust at the time of decedent's death should be included in her gross estate. So in this case, as in *Commissioner* v. *Field,* No. 578, decided this day, we are not faced with the question whether *May* v. *Heiner,* 281 U. S. 238, should survive *Helvering* v. *Hallock,* 309 U. S. 106. On the findings of the District Court, it is plain that the entire corpus must be included in decedent's gross estate by virtue of § 302(c) of the 1926 Act unless the value of the life estate must be deducted. The value of the life estate deducted in the *Hallock* case was the life estate in the settlor's wife. It was excluded because it took effect in possession or enjoyment when the trust was created. The life estate which the decedent reserved to herself is obviously in a different category. It is not an "outstanding life estate" within the meaning of Treasury Regulations 80, Art. 17.

I would rest the decision there and reserve judgment on the other questions adverted to in the opinion of the Court.